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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS MENDOZA,

Defendant and Appellant.

D047643

(Super. Ct. No. SCD181922)

APPEAL from a judgment of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed in part, reversed in part and remanded for further proceedings.

Felipe Sanchez, who has also been known as Luis Mendoza,¹ was convicted of two counts of committing lewd acts upon a child. (Pen. Code, § 288, subd. (a).) The trial

¹ It was established at trial that although Sanchez has also been known by the name Luis Mendoza, his proper name is Felipe Sanchez. Thus although Sanchez was charged

court sentenced Sanchez to prison for 10 years for the sex offenses and imposed a one-year sentence for a prior drug conviction for which Sanchez was on probation at the time he was arrested for the instant offenses.

Sanchez argues that the trial court erred by instructing the jury during Sanchez's testimony that it had already ruled Sanchez's admissions to police were admissible and that police had not violated Sanchez's *Miranda*² rights. Sanchez also argues that the trial court's imposition of an upper term sentence violated his constitutional right to a jury trial.

As we will explain, we conclude (1) that the trial court did not err in instructing the jury; and (2) that the trial court's imposition of an upper term sentence violated Sanchez's constitutional right to a jury trial. Accordingly, we affirm in part, and we reverse in part and remand for further sentencing proceedings.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual Background of the Offenses*

Yesenia G. lived with Sanchez and her three children Jessica, Jennifer and Felipe, Jr., in a one-bedroom apartment. In April 2004 Jennifer was eight years old and Jessica was seven years old. Sanchez is the father of Felipe, Jr., who was born in 2002, but he is not the father of Jessica and Jennifer.

in this case under the name Luis Mendoza, we will accordingly refer to the defendant as Sanchez throughout our discussion.

In the one-bedroom apartment, Yesenia, Sanchez and Felipe, Jr., slept on the bed, and Jennifer and Jessica slept on the floor at the foot of the bed. Yesenia testified that early in the morning of April 12, 2004, she went to bed at 1:00 a.m. while Sanchez stayed in the living room to watch television. While Yesenia was trying to fall asleep, Sanchez came into the bedroom from the living room approximately four times. Yesenia twice saw Sanchez bending down to where Jennifer and Jessica were sleeping at the foot of the bed. She became suspicious that Sanchez was molesting the girls and confronted Sanchez, who denied doing anything wrong. Yesenia then spoke to Jessica and Jennifer, who told her that on other occasions Sanchez had touched their genitals.

Yesenia left the house with the children and called the police. Later that day, Jennifer and Jessica were interviewed by a social worker and underwent medical exams, and Sanchez was interviewed by the police.

Jennifer and Jessica both told the social worker that on several occasions Sanchez had touched their genitals while they were asleep. Jennifer's physical exam was normal, although it did not rule out sexual abuse. Jessica's hymen was somewhat narrow, which could have indicated a previous injury, such as from sexual abuse.

Sanchez's interview with police lasted several hours. During the interview, Sanchez initially denied improperly touching either Jennifer or Jessica. However, later in the interview he admitted to touching Jennifer's genital area on two occasions approximately five or six months earlier. He claimed that Jennifer had taken his hand

² *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

and placed it under her panties while they were watching television. He denied having improperly touched Jessica.

Sanchez was arrested and charged with eight counts of committing a lewd act upon a child. Counts 1 and 2 alleged that Sanchez touched Jennifer's vagina; counts 3, 4 and 5 alleged that Sanchez touched Jennifer's buttocks; count 6 and 7 alleged that Sanchez touched Jessica's vagina; and count 8 alleged Sanchez touched Jessica's buttocks.

B. *Trial Proceedings*

During in limine motions, the trial court ruled that Sanchez's statements to police were not obtained in violation of his Fourth Amendment rights. Specifically, the trial court ruled that Sanchez was properly informed of his *Miranda* rights and there did not appear to be any undue pressure or coercion applied to Sanchez during the interview. Accordingly, the trial court denied defense counsel's motion to exclude the videotapes of the interview.

At trial, Jennifer testified that when she was seven years old Sanchez started touching her with his hands in her genital area and buttocks while she was sleeping and that Sanchez touched her genital area while they were watching television on the living room couch. Jessica testified that Sanchez had starting touching her private parts when she was seven years old, and it would happen when she was in bed.

The jury was shown videotapes of Sanchez's interview with the police and Jennifer and Jessica's interview with the social worker.

This appeal centers on an instruction that the trial court gave to the jury during Sanchez's testimony. The context in which the instruction was given is relevant to our analysis, and we thus review it here.

Sanchez testified that he had never touched Jennifer's or Jessica's genital area or buttocks. Defense counsel thus elicited testimony from Sanchez to explain why he had falsely admitted to the police that he had touched Jennifer. Sanchez stated that he told the police that Jennifer had placed his hands on her genital area because the police were pressuring him to admit something and he wanted them to leave him alone.

Next, defense counsel explored whether Sanchez understood his constitutional rights while the police were questioning him. In response to defense counsel's questioning, Sanchez testified that the police did not tell him that he had the right to remain silent and that he did not have to answer any of their questions, but that they did ask him if he understood all of his rights. When defense counsel asked Sanchez whether he had understood that he could have stopped the interview at any time, the prosecutor objected on the grounds of relevancy.

The trial court and counsel addressed the objection in a sidebar discussion. The prosecutor argued that because the trial court had already ruled in limine that Sanchez had voluntarily waived his *Miranda* rights,³ testimony regarding the voluntariness of

³ "Under the familiar requirements of *Miranda*, designed to assure protection of the federal Constitution's Fifth Amendment privilege against self-incrimination under 'inherently coercive' circumstances, a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is

Sanchez's admission was irrelevant. Defense counsel took issue with that position and explained that the circumstances of Sanchez's admission were relevant because they would allow the jury to determine whether, as Sanchez claimed, he made a false admission because he felt pressured. Then, putting aside the original relevancy objection, the prosecutor argued that if defense counsel *was* permitted to ask about whether Sanchez felt pressured, the prosecution "should be permitted to bring up that the court has already [ruled] that the statements are admissible."

Agreeing to this approach, defense counsel responded, "You can give them the instruction that you have already ruled on the [admissibility] of the statement. I'm not challenging that." The prosecutor thus stated, "I would ask for an instruction now because it is giving [the jury] the wrong impression. They were thinking his rights were violated. He gave a statement that his rights weren't read to him and that he has given a statement under duress." Defense counsel again agreed: "I have no problem if you think that's the way that it is going, but I don't see it that way. . . . Your ruling has been that it is admissible and that's not a contestable issue. So I am not challenging that. But I am just setting up the context under which he felt pressure." Accordingly, the trial court stated, "At this time, I will just tell the jury that I have already ruled that his statements to the police were admissible and there was no *Miranda* violation." Defense counsel replied, "I'm okay with that."

indigent." (*People v. Sims* (1993) 5 Cal.4th 405, 440, citing *Miranda*, *supra*, 384 U.S. 436, 444-445, 473-474.)

The trial court then instructed the jury, "Ladies and Gentlemen, there was an objection as to relevancy. At this time, I will overrule the objection as to relevancy. However, I will admonish the jury that in pre-trial motions, the court already made a finding that the statements to the police officers were admissible and that there has been no violation of Mr. Sanchez's *Miranda* rights."

Following the instruction, defense counsel resumed questioning Sanchez, eliciting Sanchez's testimony that he admitted to touching Jennifer because he wanted everything to end and was looking for a way to get the police to stop asking questions.

During cross-examination, the prosecutor explored whether Sanchez was pressured during the police interview and whether Sanchez had been advised of his constitutional rights. Sanchez admitted that the police told him he had the right to an attorney and the right to remain silent before they interviewed him. He also admitted that during the interview he signed a consent form indicating that he had agreed to talk and could terminate the discussion at any time, and that he knew it was within his power to stop the conversation at any time.

The jury found Sanchez guilty of two counts of committing a lewd act upon a child by touching Jennifer's vagina on two occasions and acquitted him of all other charges.

II

DISCUSSION

A. *Sanchez's Challenge to the Trial Court's Instruction to the Jury*

Sanchez argues that the trial court erred by instructing the jury that it had made a finding that Sanchez's statements to the police officers were admissible and that Sanchez's *Miranda* rights had not been violated. Sanchez argues that "the trial court removed from the jury's consideration the question of whether appellant's statements were the result of police pressure and thus not reliable."

Sanchez's argument is premised on the principal that the probative weight of a confession is "exclusively for the jury to assess." (*Crane v. Kentucky* (1986) 476 U.S. 683, 688 (*Crane*).) "[A] jury is not to hear a confession unless and until the trial judge has determined that it was freely and voluntarily given." (*Sims v. Georgia* (1967) 385 U.S. 538, 543-544, citing *Jackson v. Denno* (1964) 378 U.S. 368, 393-396 (*Jackson*).) However, "because 'questions of credibility, whether of a witness or of a confession, are for the jury,' the requirement that the court make a pretrial *voluntariness* determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial." (*Crane*, at p. 688.) "[A] defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." (*Id.* at p. 689.) Indeed, "the jury, if it so

chooses," may "give absolutely no weight to the confession in determining the guilt or innocence of the defendant." (*Sims*, at p. 544.)⁴

In *Crane*, the United States Supreme Court ruled that because "evidence about the manner in which a confession was obtained is often highly relevant to its reliability and credibility," when the trial court excludes evidence that might have caused the jury to question a confession's reliability, a defendant is deprived of his Sixth and Fourteenth Amendment rights to "'a meaningful opportunity to present a complete defense.'" (*Crane*, *supra*, 476 U.S. at p. 690.) *Crane* drew a clear distinction between (1) the *legal* issue of voluntariness, which determines the admissibility of a confession and is decided by the court, and (2) the separate *factual* question of the confession's reliability, which is a question for the jury. (*Id.* at p. 684.)

Sanchez acknowledges that the trial court did not explicitly remove the factual issue of voluntariness from the jury's consideration.⁵ However, he argues that the *effect* of the trial court's instruction was the same. He argues that "the trial court's admonition to the jury that it had ruled the evidence admissible, and there was no *Miranda* violation,

⁴ We note that Sanchez's opening brief also cites two California cases for the proposition that the jury, along with the court, should determine whether a confession is freely and voluntarily made. (*People v. Fox* (1944) 25 Cal.2d 330; *People v. Watson* (1961) 198 Cal.App.2d 707.) Those cases, however, were decided before *Jackson*, *supra*, 378 U.S. 368, 393-396, and *Crane*, *supra*, 476 U.S. 683, set uniform constitutionally-based ground rules for the distinct roles played by the jury and the trial court in considering the voluntariness of a confession. As Sanchez's reply brief recognizes, *Crane* is the current relevant precedent for the question presented here.

was functionally the same as excluding [Sanchez's] evidence that he had been pressured into making a confession. There was more than a reasonable likelihood that the jury understood the admonition to mean that [Sanchez's] admissions to [police] were true."

Sanchez argues that "the jurors could *not* have understood that the trial court's pretrial ruling was not binding on them, and [that] the jurors were free to make their own independent determination of the voluntariness of [Sanchez's] admissions." (Italics added.) According to Sanchez, "[i]t was unlikely that the jury could distinguish between a pretrial ruling by the trial court that [Sanchez's] statements were admissible, and no *Miranda* violation had occurred, from its own obligation to make an independent determination of the reliability of [Sanchez's] admissions." (Italics added.)

We disagree. Sanchez's argument is flawed because the trial court did not decide the factual issue of voluntariness for the jury. Nor did the trial court remove the factual issue from the jury's consideration. The trial court merely explained that it had already determined that Sanchez's statements to the police were admissible and that Sanchez's *Miranda* rights had not been violated. Unlike in *Crane*, the trial court in this case gave Sanchez a full opportunity to present evidence regarding the voluntariness of his statements.⁶ Indeed, following the trial court's instruction, defense counsel continued to

⁵ Specifically, Sanchez recognizes that the "instruction did not explicitly tell the jury that [Sanchez's] admissions had been freely and voluntarily given and should be given weight by the jury."

⁶ Sanchez acknowledges that the trial court "did not prevent [him] from presenting evidence concerning the circumstances of his admissions."

elicit testimony from Sanchez describing the pressure that he felt to make an admission to police. Also, during closing argument, the trial court did not bar defense counsel from arguing that Sanchez's admissions were unreliable and should be disregarded because Sanchez testified that he made them to end the police interview. Sanchez thus had a "'meaningful opportunity to present a complete defense,'" as required by *Crane, supra*, 476 U.S. at page 690, and we accordingly find no support for Sanchez's argument that the trial court's instruction to the jury infringed his constitutional rights.⁷

B. *Sanchez's Challenge to the Imposition of an Upper Term Sentence*

Sanchez's remaining contention is that by imposing an upper term sentence in accordance with California's determinate sentencing law (DSL), the trial court violated his rights to a jury trial under the federal constitution.

⁷ We acknowledge that the trial court's instruction informed the jury that Sanchez's statements were admissible and that his *Miranda* rights were not violated, but it did not clarify the meaning of the terms "admissible" and "*Miranda* rights," and did not explain the legal significance of the admissibility ruling. Although the trial court might have chosen to give a lengthier instruction elaborating on some issues that may have been unclear to the jury, "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Lang* (1989) 49 Cal.3d 991, 1024; see also *People v. Hart* (1999) 20 Cal.4th 546, 622 [appellant could not complain about ambiguity of jury instruction without having requested a clarifying instruction in the trial court]; *People v. Dennis* (1998) 17 Cal.4th 468, 514 ["If defendant believed the instructions were incomplete or needed elaboration, it was his obligation to request additional or clarifying instructions. [Citation.] His failure to do so waives the claim in this court"].) Here, because Sanchez did not argue in the trial court that clarifications were needed to prevent any misapplication of the instruction by the jury, we will not on appeal consider whether the instruction, agreed to by defense counsel, should have been clarified or worded differently.

After we initially issued an opinion in this case rejecting Sanchez's argument, the United States Supreme Court decided in *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] that California's determinate sentencing law (the DSL) is unconstitutional. After receiving briefing from the parties, we granted Sanchez's petition for rehearing.

In *Cunningham v. California, supra*, 549 U.S. ____ [127 S.Ct. 856], the United States Supreme Court held that the DSL violates a criminal defendant's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution because it allows the trial judge to find facts that will elevate a sentence. (*Cunningham*, at p. 860.) *Cunningham* explained that because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence rather than by proof beyond a reasonable doubt, the DSL violates the rule in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 that any fact, other than the fact of a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. (*Cunningham*, at p. 868.) Stating that "'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*,'" *Cunningham* concluded that "the middle term prescribed in California statutes, not the upper term, is the relevant statutory maximum." (*Cunningham*, at pp. 865, 868.)

Here, the probation officer's report listed three possible circumstances in aggravation: (1) the manner in which the crime was carried out indicated planning;

(2) Sanchez took advantage of a position of trust; and (3) Sanchez was on probation when he committed the offense. The probation officer's report listed one possible circumstance in mitigation: Sanchez was "ineligible for probation and but for that ineligibility he may have been granted probation."

The trial court imposed an upper term sentence, stating that the "factors in aggravation far exceed the factors in mitigation." Although the trial court could have been more explicit about the factors upon which it was relying, the trial court appears to have relied on all three of the aggravating factors and weighed those factors against the single mitigating factor.

Because, by relying on all three aggravating factors, the trial court relied upon facts not found by a jury beyond a reasonable doubt to impose a sentence beyond the prescribed statutory maximum middle term, the trial court imposed a sentence in violation of Sanchez's right to a jury trial safeguarded by the Sixth and Fourteenth Amendments to the federal Constitution. (*Cunningham v. California, supra*, 549 U.S. ____ [127 S.Ct. at p. 860].)⁸ We thus vacate the sentence and remand the case for further proceedings not inconsistent with this opinion and *Cunningham*.

⁸ The Attorney General argues that the fact that Sanchez was on probation when he committed the offense may be treated like the fact of a prior conviction, and thus may be used as an aggravating factor without a jury finding as to that fact. We find it unnecessary to reach that issue to resolve this appeal. It is clear under the facts of this case that we must remand for resentencing. Even if the fact that Sanchez was on parole at the time of the offense were to be treated identically to the fact of a prior conviction, the trial court also relied on other aggravating factors. The trial court's process of arriving at the upper term sentence was thus unquestionably flawed under the holding of

DISPOSITION

The judgment is reversed in part, and the case is remanded for the trial court to conduct a new sentencing hearing consistent with the views expressed in *Cunningham v. California, supra*, 549 U.S. ____ [127 S.Ct. 856]. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.

Cunningham because the trial court engaged in a weighing procedure that relied on several mitigating factors that were not found by the jury beyond a reasonable doubt.